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The Juvenile Curfew Ordinance: In Search of a New Standard of Review

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THE JUVENILE CURFEW ORDINANCE: IN SEARCH OF A NEW STANDARD OF REVIEW

A police officer on late night patrol spotted two teenagers walking briskly along a street in one of Atlanta's toughest southside neighborhoods. Approaching the youths, the officer peered out of the squad car window and demanded that each reveal her age. Looking at each other, stunned, the young women responded "eighteen" and "fifteen" respectively. The officer ordered the younger of the two into the car and escorted her home. The fifteen year-old's presence on the street at 1 a.m. violated Atlanta's juvenile curfew law.[1]

1. Marilyn Milloy, *Battle Lines Drawn Over Curfews*, NEWSDAY, Dec. 16, 1990, at 15.

The Atlanta juvenile curfew ordinance provides in pertinent part:

It is unlawful for any minor 16 years of age or younger to loiter, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds or other public grounds, public places, public buildings, places of amusement, eating places, vacant lots or any place unsupervised by an adult having the lawful authority to be at such places, between the hours of 11 p.m. on any day and 6 a.m. of the following day; provided, however, that on Fridays and Saturdays the effective hours are between 12 midnight and 6 a.m. of the following day; and provided, that the provisions of this section shall not apply in the following instances:

(a) When a minor is accompanied by his or her parent, guardian or other adult person having the lawful care and custody of the minor;

(b) When the minor is upon an emergency errand directed by his or her parent or guardian or other adult person having the lawful care and custody of such minor;

(c) When the minor is returning directly home from a school activity, entertainment, recreational activity or dance;

(d) When the minor is returning directly home from lawful employment that makes it necessary to be in the above referenced places during the proscribed period of time;

(e) When the minor is attending or travelling directly to or from an activity

INTRODUCTION

This Note addresses the various substantive constitutional issues[2] triggered by juvenile[3] curfew[4] ordinances. Part I of this Note briefly considers the history of juvenile curfew ordinances. Part II examines how federal and state courts treat juvenile rights relative to those of adults in the context of nocturnal curfew ordinances. Part III addresses minors' substantive due process and equal protection claims implicated by the enactment of juvenile curfew ordinances. Finally, Part IV proposes a comprehensive framework for assessing juvenile rights in the context of curfew ordinances.

I. HISTORY OF JUVENILE CURFEW ORDINANCES

State and local governments began enacting juvenile curfew ordinances in the United States during the nineteenth century.[5] Prior to the Civil War, southern towns enacted curfew ordinances prohibiting the presence of slaves and free blacks on public streets between certain

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involving the exercise of first amendment rights of free speech, freedom of assembly or free exercise of religion;

(f) When the minor is in a motor vehicle with parental consent for normal travel, with interstate travel through the City of Atlanta, excepted in all cases from the curfew.

ATLANTA, GA., CODE OF ORDINANCES ch. 7, § 17-7002 (1990).

2. This Note does not address the various procedural issues resulting from the enactment of a juvenile curfew ordinance. *See, e.g.*, Naprstek v. City of Norwich, 545 F.2d 815, 818 (2d Cir. 1976) (invalidating a juvenile curfew ordinance on vagueness grounds for its failure to establish a curfew cutoff time); *In re* Doe, 513 P.2d 1385, 1388 (Haw. 1973) (invalidating a juvenile curfew ordinance on vagueness and overbreadth grounds because the term "loitering" is too vague and imprecise).

3. For purposes of this Note, the terms "juveniles," "children," and "minors" shall be used interchangeably. Each shall refer to youths restricted by juvenile curfew ordinances.

4. A curfew is a "law (commonly an ordinance) which imposes on people (particularly children) the obligation to remove themselves from the street on or before a certain time of night." BLACK'S LAW DICTIONARY 381 (6th ed. 1990).

5. *See* Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688, 690 (Md. 1964) (providing a brief overview of the history of curfew regulations). Long before American independence, Alfred the Great introduced the curfew regulation to England. *Id.* The regulation provided that the inhabitants of Oxford should cover and protect the fires in their homes and go to bed at the tolling of the curfew bell. *Id.* Later in English history, William the Conqueror strictly enforced curfew regulations to guard against fire and to prevent the citizenry from gathering at night. *Id. See also* Jeffrey F. Ghent, Annotation, *Validity and Construction of Curfew Statute, Ordinance, or Proclamation*, 59 A.L.R. 3D 321, 325-26 (1974).

hours.[6] Since the nineteenth century, american states, cities, and towns have imposed curfews for purposes such as maintaining the peace in emergencies,[7] limiting the operating hours of public parks,[8] keeping

6. Several courts have assessed the constitutional validity of the pre-Civil War curfew ordinances. *See, e.g.*, Mayor of Memphis v. Winfield, 27 Tenn. (8 Hum.) 707, 710 (Tenn. 1848) (invalidating an "oppressive" municipal ordinance directing police to arrest and fine all free blacks on the street after 10 p.m). Notably, as recently as 1970 curfews based on race existed in the United States. *See, e.g.*, Chase v. Twist 323 F. Supp. 749, 766 (E.D. Ark. 1970) (refusing to enjoin mayor, sheriff, or police from imposing curfews against blacks because plaintiffs did not establish their various allegations).

7. Several courts have assessed the constitutional validity of emergency curfews. *See, e.g.*, United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir.) (upholding a curfew issued as a result of riots between police and black high school students), *cert. denied*, 404 U.S. 943 (1971); People v. McKelvy, 100 Cal. Rptr. 661, 665 (Cal. Ct. App. 1972) (declaring that a showing of clear and emergent necessity engendered by race riots justified imposition of a curfew); Davis v. Justice Court, 89 Cal. Rptr. 409, 414 (Cal. Ct. App. 1970) (upholding the issuance of a curfew over a housing project in which riotous conditions existed); State v. Boles, 240 A.2d 920, 925 (Conn. Cir. Ct. 1967) (upholding curfew issued when property destruction and riotous conditions threatened the city's general welfare); Glover v. District of Columbia, 250 A.2d 556, 559 (D.C. 1969) (upholding a curfew barring all persons except police, firemen, medical personnel and sanitation workers from the streets as a reasonable and usual police regulation in response to serious disorders throughout the city); Municipal Court v. Patrick, 254 So. 2d 193, 194-95 (Fla. 1971) (invalidating a mayor's curfew issuance because the power to issue curfews during times of emergency belonged to the City Commissioner); Walsh v. City of River Rouge, 189 N.W.2d 318, 326 (Mich. 1971) (holding that in times of civil disorder and riot the city may not issue curfews absent an action by the governor because state action preempts city action in such circumstances); State v. Dobbins, 178 S.E.2d 449, 456 (N.C. 1971) (enacting an emergency curfew ordinance was a valid use of the state's police power when the city faced imminent threat of widespread burning and other destruction to public and private property); Ervin v. State, 163 N.W.2d 207, 210-11 (Wis. 1968) (upholding a municipal curfew imposed to restore order after the outbreak of local riots).

8. Courts assessing the constitutional validity of curfews in parks often find the ordinances reasonable. *See, e.g.*, Peters v. Breier, 322 F. Supp. 1171, 1172 (E.D. Wis. 1971) (upholding a curfew ordinance because it restricted use of a carefully defined area (a park) during specified hours, provided appropriate notice, and applied to all persons indiscriminately); People v. Trantham, 208 Cal. Rptr. 535, 538 (Cal. Ct. App. 1984) (holding that a city ordinance prohibiting any person from entering, remaining, staying or loitering in a public park between the hours of 10:30 p.m. and 5:00 a.m. was not overbroad or vague); Chicago Park Dist. v. Altman, 262 N.E.2d 373, 374 (Ill. App. Ct. 1970) (holding that a regulation limiting the use of a park between 11 p.m. and 4 a.m. was a reasonable use of the park district's power); People v. Zalon, 145 N.Y.S.2d 269, 270-71 (1955) (holding that a park department regulation prohibiting persons from loitering or remaining in parks between midnight and one-half hour before sunrise did not infringe on one's civil liberties to an unconstitutional degree); State v. Allred, 204 S.E.2d 214, 218-19 (N.C. Ct. App. 1974) (holding that imposing a curfew on a park

vagrants off the streets,[9] and providing for the national security during times of war.[10] In the twentieth century the most prevalent and pervasive curfew ordinances have focused on juveniles.[11] In response to the increase in juvenile criminal activity,[12] various state,[13] city[14] and

during a state of emergency was a valid use of the state's police power), *cert. denied*, 419 U.S. 1127 (1975).

9. Vagrancy curfews have also resulted in litigation. *See, e.g.*, Guidoni v. Wheeler, 230 F. 93, 96-97 (9th Cir. 1916) (upholding a city ordinance defining vagrants as all persons without known employment on the street after 11:00 p.m.); Ruff v. Marshall, 438 F. Supp. 303, 305 (M.D. Ga. 1977) (invalidating on overbreadth grounds a curfew ordinance restricting loitering upon any public place of business after business hours); City of Shreveport v. Brewer, 72 So. 2d 308, 309-10 (La. 1954) (invalidating for vagueness an ordinance providing penalties for people "[w]ho shall be on the street after midnight without a satisfactory explanation"); City of Portland v. James, 444 P.2d 554, 556 (Or. 1968) (invalidating on vagueness grounds an ordinance making it unlawful for any person to roam or be upon any street between 1 a.m. and 5 a.m.).

10. Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (holding valid under the war power curfew regulations created under an executive order imposed upon all persons of Japanese ancestry in military areas during World War II); *Ex parte* Ventura, 44 F. Supp. 520, 523 (W.D. Wash. 1942) (upholding a restriction on movement of American born citizens of Japanese ancestry in critical military areas essential for national defense during World War II).

11. Initially, juvenile curfew ordinances manifested native-born Americans' fear that recently arrived immigrants could not control their children. Francis J. Flaherty, *Curfew Law Sparks Battle in Detroit*, NAT'L L.J., Aug. 1, 1983, at 10, 43. By 1900, approximately 3000 villages and municipalities had juvenile curfew ordinances. Ghent, *supra* note 5, at 326. In 1964, forty-eight cities with populations greater than 100,000 enforced juvenile curfew ordinances while nine other cities in that population category had unenforced juvenile curfew ordinances on the books. *Id.* *See also* Thistlewood v. Trial Magistrate, 204 A.2d 688, 691 (Md. 1964); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66 (1958) (detailing the results of a survey determining which major cities in the United States had curfew ordinances in 1958).

12. Between 1985 and 1989 the total number of juveniles (under the age of 18) arrested increased 2.3% from 1.59 to 1.63 million. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS 178 (1989). During that same period, the number of juveniles arrested for violent crimes increased 21% from 65,880 to 79,709. *Id.* Juvenile arrests for murder and non-negligent manslaughter increased 67.1% from 1,248 in 1985 to 2,086 in 1989 while juvenile arrests for aggravated assault increased 40.3% from 31,178 to 43,751 during that same period. *Id.* Between 1988 and 1989 juvenile murder arrests increased 18% while murder arrests for persons 18 years of age and older increased only 3%. *Id.* at 13.

13. *See, e.g.*, ILL. REV. STAT. ch. 24, para. 11-1-5 (1989); MICH. COMP. LAWS ANN. §§ 722.730-722.754 (West 1968 & Supp. 1991) (state amended section 722.752 in 1972); OR. REV. STAT. §§ 419.710-419.760 (1987).

14. *See, e.g.*, ATLANTA, GA., CHARTER AND CODE OF ORDINANCES OF THE CITY ch. 7, § 17-7002 (1990); DETROIT, MICH., MUNICIPAL CODE ch. 33, art. III §§ 1-3 (1987); LOS ANGELES, CAL., MUNICIPAL CODE § 45.03 (1988); PHILADELPHIA, PA.,

town[15] governments enacted, or increased enforcement of,[16] legislation aimed at keeping children off the streets during defined nighttime hours. Although enacting juvenile curfew ordinances is an inexpensive means of attempting to control juvenile crime,[17] the curfews are difficult to enforce,[18] disliked by large segments of the public,[19] arguably

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CODE ch. 10, §§ 300-309 (1980); PUEBLO, COLO., MUNICIPAL CODE, § 11-1-703 (1982); TRENTON, N.J., CITY ORDINANCES § 83-134 (1983). Other cities have enacted juvenile curfew statutes which courts later invalidated on constitutional grounds. *See, e.g.*, Waters v. Barry, 711 F. Supp. 1125, 1134-40 (D.D.C. Cir. 1989) (invalidating the Washington, D.C. curfew ordinance on substantive due process and equal protection grounds).

15. *See, e.g.*, BELZONI, MISS., ORDINANCE 491 (1991); DREW, MISS., ORDINANCE ESTABLISHING A CURFEW FOR UNEMANCIPATED MINORS UNDER THE AGE OF EIGHTEEN YEARS IN THE CITY OF DREW PROVIDING THE PENALTY THEREFORE AND FOR RELATED PURPOSES (1991); INDIANOLA, MISS., ORDINANCE ESTABLISHING A CURFEW FOR UNEMANCIPATED MINORS UNDER THE AGE OF EIGHTEEN YEARS IN THE CITY OF INDIANOLA PROVIDING PENALTY THEREFORE AND FOR RELATED PURPOSES (1991).

16. Cities or towns often enact juvenile curfew ordinances and leave them on the books, unenforced, for several years. In response to increasing crime rates, the police have the option of stepping up enforcement of these curfews to keep minors off the streets and in the home. For example, in 1983, Detroit attempted to answer its urban crime problem by strictly enforcing its 1976 juvenile curfew ordinance for the first time. *Mayor Imposes Juvenile Curfew: Hot Summer In Detroit?*, CRIM. JUST. NEWSL., (Nat'l Council on Crime and Delinquency, San Francisco, Cal.), Aug. 1, 1983, at 7. *See also* Flaherty, *supra* note 11, at 10. Cities or towns may also enact or update juvenile curfew ordinances to more effectively combat new types of juvenile crime. For example, the city of Los Angeles rewrote its curfew ordinance in 1987, twenty years after the law's inception, to control epidemic gang violence. Strong enforcement of the updated ordinance resulted in a decrease in gang related homicides and shootings. Joyce Price, *Curfew Laws Sweep Kids Off Streets, But Police Wonder 'Does It Work?'*, WASHINGTON TIMES, Dec. 11, 1990, at A1.

17. Price, *supra* note 16, at A1. Commentators argue that the imposition of a juvenile curfew ordinance is an inexpensive and expedient method by which a politician can appease constituents complaining about increasing local crime rates. *Id.*

18. *Id.* Some commentators argue that the lack of governmental resources makes the enforcement of curfew ordinances difficult. *Id.* For example, the state, city, or town enacting the curfew may not have the funding necessary to put extra police officers on the streets to enforce the curfew ordinance. *Id.* Therefore, when a legislature enacts a curfew without appropriating additional funds to the police department for enforcement, the department must either take resources away from other important police activities, such as murder, rape, and burglary investigation and prevention, to enforce the curfew or it must elect not to enforce the curfew. *Id.*

19. *See, e.g.*, Mark Mayfield, *Curfew Clock Ticks For Teens*, USA TODAY, Dec. 11, 1990, at 3A (quoting teenagers who argue that juvenile curfew ordinances are unfair because the responsibility for raising the children rests on the parents, not on the state); Clarence Page, *Why Atlanta's Teen Curfew Misses the Mark*, CHI. TRIB., Dec. 12, 1990, at C25. (arguing that juvenile curfews will victimize black males who will dispropor-

ineffective,[20] and legally questionable under various constitutional theories.[21]

II. FEDERAL AND STATE COURT TREATMENTS OF MINORS' RIGHTS IN THE CONTEXT OF NOCTURNAL CURFEW ORDINANCES

Although the Supreme Court has clearly stated that certain constitutional guarantees apply to children,[22] it has also posited that juveniles'

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tionately be confronted by police during proscribed hours because a majority of the crimes perpetrated in the cities are committed by blacks).

20. *See, e.g.*, Marilyn Milloy, *Battle Lines Drawn Over Curfews*, NEWSDAY, Dec. 16, 1990, at 15 (arguing that juvenile curfew ordinances are ineffective in halting the increasing juvenile crime rates); Price, *supra* note 16, at A1 (quoting law enforcement authorities claiming that juvenile curfew ordinances are an ineffective response to crime). At least one commentator argues that a substantial proportion of juvenile crimes go undetected; therefore, an accurate assessment of a juvenile curfew's effectiveness is impossible. Note, *supra* note 11, at 95. The author also makes the following generalizations regarding the effectiveness of curfews: juveniles who adhere to curfew ordinances generally do not engage in criminal activity; curfews will not deter juveniles who engage in criminal activity; and juveniles on the "fringe" of delinquency may be deterred from violating the curfew because of the potential punishment to their parents. *Id.* at 96-97. *Contra* Milloy, *supra*, at 15 (psychoanalyst Dr. Francis Ianni of Columbia's Teachers College argues that juvenile curfew ordinances can have the unintended effect of challenging generally law abiding juveniles to beat a system they think is unfair).

21. *See infra* notes 69-134 and accompanying text discussing the constitutional issues of juvenille curfews.

22. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 648 (1979) (holding that a Massachusetts statute unduly burdened a minor's right to obtain an abortion because it required a pregnant minor to obtain both parents' consent or judicial approval); Carey v. Population Servs. Int'l, 431 U.S. 678, 697-99 (1977) (holding that a New York statute unconstitutionally invaded a minor's right to privacy because it denied minors under the age of 16 access to birth control); Planned Parenthood v. Danforth, 428 U.S. 52, 72-74 (1976) (invalidating a Missouri statute requiring an unmarried woman under the age of 18 to obtain parental consent prior to obtaining an abortion unless a licensed physician determined that the abortion was required to preserve the life of the mother); Breed v. Jones, 421 U.S. 519, 531-32 (1975) (holding that the prosecution of a minor in a superior court, after an adjudicatory proceeding in a juvenile court, violated the Fifth Amendment's Double Jeopardy Clause); Goss v. Lopez, 419 U.S. 565, 574-76 (1975) (holding that minors suspended from school for up to ten days without a hearing were denied due process of law); Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (holding that the state may not compel children who complete the eighth grade to attend formal high school through the age of 16); *In re* Winship, 397 U.S. 358, 361-62 (1970) (holding that juveniles are entitled to the proof beyond a reasonable doubt standard for conviction when charged with a criminal law violation); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (holding that not allowing minors to wear black armbands while protesting the Vietnam War violated minors' First Amendment

rights are not coextensive with adults' rights in all situations.[23] In *Bellotti v. Baird*,[24] the Supreme Court cited certain juvenile characteristics that lower courts often consider in determining whether a state may encroach upon minors' constitutional rights to a greater degree than those of adults.[25] Whether these concerns should apply outside of the abortion rights context remains unclear.[26] Nonetheless, several lower courts have considered these concerns in analyzing juvenile curfew ordinances and have obtained inconsistent results.[27]

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rights); *In re* Gault, 387 U.S. 1 (1967) (holding that a juvenile has the right to notice of charges, to counsel, to cross-examination and confrontation of witnesses, and to privileges against self-incrimination); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925) (holding that an Oregon statute requiring minors to attend public school was a liberty deprivation under the Fourteenth Amendment).

23. *See, e.g.*, Bethel Sch. Dist. Number 403 v. Fraser, 478 U.S. 675, 682 (1986) (declaring that the First Amendment does not protect discourse among school children to the same extent that it does discourse among adults); H.L. v. Matheson, 450 U.S. 398, 409 (1981) (upholding a Utah statute requiring physicians to notify parents before performing an abortion on an immature dependent); Parham v. J.R., 442 U.S. 584, 606-08 (1979) (upholding a Georgia statute permitting parents to voluntarily commit their children to mental institutions without a formal, judicial type hearing); Ingraham v. Wright, 430 U.S. 651 (1977) (upholding the constitutionality of the disciplinary paddling of students who received no prior notice or hearing); McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (holding that a trial by jury is not required in the adjudicative stage of a state juvenile court proceeding); Ginsberg v. New York, 390 U.S. 629, 637-38 (1968) (holding that the state may constitutionally accord minors under 17 a more restricted right to sexual material than that assured to adults); Prince v. Massachusetts, 321 U.S. 158, 169-71 (1944) (holding that a Massachusetts statute prohibiting magazine sales by children on the streets did not violate their First Amendment rights). *See also* Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 467 (1982) (stating that the Supreme Court's extension of rights to children is qualified because the rights of children "are not commensurate with those available to adults"); Irene M. Rosenberg, *The Constitutional Rights of Children Charged With Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 701 (1980) ("[T]he Court's reluctance to extend full constitutional protection to alleged juvenile delinquents may reflect the view that the liberty interest of the child is simply not as extensive as that of an adult.").

24. 443 U.S. 622 (1979).

25. *Id.* at 634. The Court noted that the status of minors under the law has long been recognized as unique in many respects. *Id.* at 633. The Court then recognized that children's constitutional rights cannot be equated with those of adults because of children's peculiar vulnerability, their inability to make critical decisions in a mature and informed manner, and the importance of parents in child rearing. *Id.* at 634. *See also infra* notes 30-33 and accompanying text.

26. *See infra* note 64 for an analysis of the difficulties courts face in applying the *Bellotti* concerns to different factual settings.

27. *Compare* Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989) *with* People *ex rel.*

In *Bellotti*, the Supreme Court determined the constitutional validity of a statute requiring pregnant minors to obtain either both parents' permission or judicial permission to have an abortion.[28] The Court held the statute unconstitutional on the ground that it unduly infringed upon a minor's right to seek an abortion.[29] The Court cited three reasons why the state may, in certain circumstances, restrict children's constitutional rights to a greater degree than those of adults: the child's peculiar vulnerability,[30] the child's inability to make critical decisions[31] in an informed, mature manner,[32] and the importance of the parental role in child rearing.[33]

J.M., 768 P.2d 219 (Colo. 1989). *See infra* notes 35-64 for a detailed analysis of the above cases.

28. 443 U.S. at 625-26. In *Bellotti*, the Court determined the constitutionality of a Massachussetts abortion law which provided in pertinent part:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown . . . .

MASS. GEN. LAWS ANN., ch. 112, § 12S (West Supp. 1979), *quoted in* Bellotti v. Baird, 443 U.S. 622, 625-26 (1979).

29. 443 U.S. at 648.

30. *Id.* at 634. The Court indicated that its decisions according minors constitutional protection against deprivations of liberty and property interests in certain situations demonstrated its concern for the vulnerability of children. *Id.* at 634-35. Notably, the Court's primary concern was the mental, not physical, vulnerability of minors; the Court declared that "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern . . . sympathy, and . . . paternal attention.'" *Id.* at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)). *See also* Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1175 (1984) (arguing that the Supreme Court's primary concern in *Bellotti* was the mental, not physical, vulnerability of the child).

31. 443 U.S. at 634. The Court held that a critical decision is an "important affirmative choice[ ] with potentially serious consequences." *Id.* at 635.

32. *Id.* at 634. The Court based its concern for minors' decision making capabilities on the "recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635. Notably, several commentators question this justification for denying juveniles the same rights accorded adults. *See, e.g.*, Robert Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363, 370 (1982) (arguing that because many adolescents have the moral reasoning capacities of adults, the law should accord competent adolescents' considered choices the same treatment it accords the considered choices of adults).

33. 443 U.S. at 634. The Court justified state deference to the parental control over children through two theories. First, it recognized that the state often "protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors." *Id.* at 637. Sec-

In the past decade, some courts examining the validity of juvenile curfew ordinances have considered the *Bellotti* rationale in determining whether children's constitutional rights should parallel those of adults in the nocturnal curfew ordinance context. A consensus has yet to appear.[34]

A. *The Courts' Varying Applications of* Bellotti *to Juvenile Curfew Ordinances*

In *People ex rel. J.M.*,[35] the Colorado Supreme Court analyzed the *Bellotti* concerns and determined that nocturnal curfew ordinances may, within constitutional bounds, restrain the rights of minors to a greater degree than those of adults.[36] The court first disposed of the "peculiar vulnerability of the child" consideration by summarily concluding that children who leave their homes at night are more vulnerable to crime and peer pressure than adults.[37]

This finding does not persuasively differentiate children's rights from adults' rights for four reasons. First, the court failed to factually support its assertion.[38] The court did not rely on expert testimony or sta-

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ond, the Court declared that the those who nurture the child and direct his destiny have the right to recognize and prepare the child for future obligations. *Id.*

34. Some courts do not even use the *Bellotti* analysis to determine the validity of juvenile curfew ordinances. *See infra* note 65 for a list of courts that have refused to apply the *Bellotti* framework.

35. 768 P.2d 219 (Colo. 1989).

36. *Id.* at 223. In *People ex rel. J.M.* the court determined the constitutional validity of the Pueblo, Colorado juvenile curfew ordinance which provided in pertinent part:

> [i]t shall be unlawful . . . for any person under the age of 18 years to loiter on or about any street, sidewalk, curb, gutter, parking lot, alley, vacant lot, park, playground or yard, whether public or private, without the consent or permission of the owner or occupant thereof, during the hours between 10:00 o'clock P.M. and 6:00 o'clock A.M . . . unless accompanied by a parent, guardian or other adult person over the age of twenty-one years.

PUEBLO, COLO., MUNICIPAL CODE § 11-1-703 (1982), *quoted in* People *ex rel.* J.M., 768 P.2d 219, 221 (Colo. 1989).

37. 768 P.2d at 223. When the court notes that children are more vulnerable to crime than adults, it apparently means that children are more likely to be victims of crimes because the court separately considered children's likelihood to commit criminal acts. *Id.*

38. For example, the court should have based its conclusion on current scientific evidence which indicates that adolescents are more responsive to peer pressure than older persons because of the adolescents' desire to conform. *See* Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109, 131 (1977) (citing Castanzo and Shaw, *Conformity as a Function of Level*, in READINGS IN ADOLESCENT DEVELOPMENT AND BEHAVIOR (J. Itell & J. Shelton eds., 1971)); Query, *The Influence of Group*

tistical information in concluding that a child's vulnerability to peer pressure and crime is greater than that of an adult. Second, the court failed to indicate why children are more easily influenced during curfew hours than during other hours of the day. Third, the court failed to acknowledge that children's levels of vulnerability to crime and peer pressure may vary. A generalization concerning the rights of all children under the curfew age does not adequately differentiate children's constitutional rights from those of adults.[39] Finally, the court's concern that children are more vulnerable to crime than adults is impertinent to the *Bellotti* analysis because *Bellotti* is only concerned with the child's mental, not physical, vulnerability.[40] Accordingly, the court erroneously concluded that children are more vulnerable than adults during curfew hours.

The *People ex rel. J.M.* court next addressed the concern that children cannot make critical decisions for themselves.[41] The court concluded that because children are immature, they may decide to engage in delinquent acts if permitted out of the home during proscribed hours.[42]

The court's application of the *Bellotti* scheme is unconvincing because the court again failed to ground its conclusion on factual premises, distinguish among children of different mental capacities,[43] and explain why children are more likely to make poor decisions at night than during the day. The court's unsubstantiated conclusion that children lack the ability to make critical decisions during curfew hours

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Pressures on the Judgments of Children and Adolescents - A Comparative Study, 3 ADOLESCENCE 153 (1969)).

39. *See generally* Batey, *supra* note 32, at 369 (citing studies which indicated that not all children have the same mental capacity; thus, the author argues, the law should not treat all children the same).

40. *See supra* note 30 for a discussion of the *Bellotti* Court's reasoning.

41. 768 P.2d at 223.

42. *Id.* The court acknowledged that adults may make the same decisions as children with respect to committing an indiscretion, but the former "are more likely to do so in an informed and mature manner with full consideration of the consequences of their acts." *Id.* This argument may be persuasive with respect to a very young minor, but to a 17 year-old juvenile of average intelligence who falls under the Pueblo ordinance, the court's assertion is inadequate. Seniors in high school know that if they decide to commit crimes, punishment will ensue, harming their futures.

43. *See* Batey, *supra* note 32, at 373 (arguing that "the law should accord the considered choices of competent adolescents the same treatment it accords similar choices of adults").

does not justify the state's restriction on minors' important constitutional rights.

Finally, the Colorado Supreme Court determined, without substantiation, that restricting minors from leaving the home during specified nighttime hours reinforces parental authority and encourages parents to actively supervise their children.[44]

Once again, the court's conclusion lacks justification and can be refuted on several grounds. First, restricting a child from leaving the home may have no impact on the amount of parental supervision. Many parents do not or cannot pay adequate attention to a child who is home.[45] Second, a juvenile curfew ordinance may encourage parents to leave the home during proscribed hours with the belief that the police will baby-sit their children by preventing them from leaving their homes during the curfew. Finally, the court's conclusion is based on the punishment provision of the Pueblo, Colorado curfew ordinance. This ordinance fails to punish the parent for a child's curfew violation.[46] Therefore, the ordinance gives parents no greater incentive to supervise their children than if the curfew did not exist. Because the court failed to address these considerations, its refusal to vindicate minors' rights on the basis that the curfew promotes parental authority is unpersuasive.[47]

On the federal level, the court in *Waters v. Barry*[48] held that a juvenile curfew ordinance accorded children's constitutional rights no less protection than those of adults.[49] The *Waters* court considered *Bel-*

44. 768 P.2d at 223.

45. In asserting that the juvenile curfew ordinance encourages parental supervision of children, the court implicitly assumes that the parents of all children are in the home during the proscribed nighttime hours. *Id.* This assumption fails to account for several situations in which the parent leaves the home at night on a regular basis for either legitimate or illegitimate reasons; *e.g.*, the single parent who must work at night to support the family; the doctor or medical student in residency who spends many, if not most, of her nights working in the hospital or clinic; and, the parent who leaves the home at night for the purpose of socializing with other adults at a neighborhood tavern.

46. *See* PUEBLO, COLO., MUNICIPAL CODE § 11-1-703 (1982) *infra* note 36.

47. It should be noted, however, that three other courts assessing the *Bellotti* concerns used the same reasoning as the Colorado Supreme Court and similarly concluded that children should not retain the same rights as adults with respect to their ability to leave the home at night. *See* McCollester v. City of Keene, 514 F. Supp. 1046, 1050-51 (D.N.H. 1981); Village of Deerfield v. Greenberg, 550 N.E.2d 12, 15-16 (Ill. 1990); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

48. 711 F. Supp. 1125 (D.D.C. 1989).

49. *Id.* at 1137. The court determined the constitutional validity of the Washington, D.C. juvenile curfew ordinance. The ordinance provided that no minors under the

lotti's concern for a child's vulnerability and determined that the crime plague afflicting Washington, D.C. posed no peculiar danger to children.[50] The court found that although the city's crime problem affected thousands of children engaging in innocent activities, the problem did not affect children any more than similarly situated adults.[51] Based on the "peculiar vulnerability of the child" concern of *Bellotti*, the court refused to permit the state to infringe upon the constitutional rights of minors to a greater extent than it would permit the state to infringe upon the rights of adults.[52]

The *Waters* court next addressed the second *Bellotti* concern that juveniles lack the ability to make critical decisions.[53] *Waters* determined that the child's decision to leave the home at night was not critical within the meaning of *Bellotti* because such a decision rarely leads to serious consequences.[54] The court, concerned for the city's innocent children, argued that the decision to leave the home at night is not critical.[55] It becomes critical only when the minor commits an illegal

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age of 18 years may remain in or upon any street, sidewalk, park or other outdoor public place in the District of Columbia between the hours of 11:00 p.m. and 6:00 a.m. each day except Friday and Saturday when the curfew commenced at 11:59 p.m. WASHINGTON, D.C., TEMPORARY EMERGENCY CURFEW ACT (1989). The ordinance exempted "minors traveling in automobiles, minors accompanied by parents (but not others), minors returning by a direct route from a pre-registered religious or other nonprofit activity, so long as it is within 60 minutes of the activity's termination, a minor engaged in legitimate employment who has on his person a valid work or theatrical permit, and a minor required by 'reasonable necessity' to conduct an emergency errand relating to the health of a family member, so long as the minor has, if practicable, a note from a parent to that effect." 711 F. Supp. at 1135.

50. 711 F. Supp. at 1137. The court reasoned that crime does not peculiarly affect children in Washington, D.C. because only 7% of the 372 homicide victims in the District of Columbia in 1988 were juveniles. *Id.* at 1139.

51. *Id.* at 1137.

52. *Id.* In Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981), the Fifth Circuit Court of Appeals similarly held that the concern for children's peculiar vulnerability emphasized in *Bellotti* is not implicated in the curfew context because children engage in many legitimate activities at night, such as attending or traveling to or from a religious, school, commercial or other bona fide organized activities. *Id.* at 1072. The *Johnson* court reasoned that the vulnerability children may feel with respect to these activities is nothing like the vulnerability the *Bellotti* Court referred to in setting children apart from adults. *Id.* at 1073.

53. 711 F. Supp. at 1137.

54. *Id.* *See supra* note 31 for the *Bellotti* Court's definition of a critical decision.

55. 711 F. Supp. at 1137. The court found that the decision to either stay home or go out at night "simply does not present the type of profound decision which *Bellotti* would leave to the state." *Id.*

indiscretion.[56] The court concluded that the vast majority of juveniles rarely, if ever, entertain the decision to engage in criminal activity.[57] Thus, the court held that an ordinance should not restrict children's rights more than adults' rights because the decision to leave the home at night is critical to only a few children.[58]

The *Waters* court completed its *Bellotti* analysis by assessing the ordinance's impact on the parental role in supervising children.[59] The court determined that the curfew ordinance implicitly rested upon the assumption that the traditional family unit[60] had dissolved in many areas of the city.[61] Although the court agreed that this dissolution existed, it disagreed that the breakdown in a minority of the city's families justified imposing a curfew infringing upon all children's rights,

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56. *Id.*

57. *Id.* Nocturnal activities "in all but the exceptional case" will not have serious consequences. *Id.*

58. *Id.* By concluding that the curfew unfairly proscribed the innocent conduct of many children, the court asserted that the curfew ordinance was overly broad. *Id.* Earlier in its decision, however, the court determined that an overbreadth analysis was inappropriate because:

> . . . the overbreadth doctrine is essentially a *jus tertii* device; it evolved in order to permit one properly charged under a statute to raise the First Amendment rights of others, not charged, whose associational or expressive rights might be chilled by enforcement of overly broad legislation. However, when, as here, the plaintiffs are themselves engaged in protected activity - when the challenged statute would have no greater impact upon the rights of nonparties than it would have upon the rights of the parties before the Court - there is no need to employ a traditional overbreadth analysis.

Id. at 1133.

In *Johnson v. City of Opelousas*, the Fifth Circuit Court of Appeals also argued that children's rights could not be infringed upon to a greater extent than adults' rights because the decision to engage in illegal activities does not involve critical decisionmaking. 658 F.2d at 1073. The *Johnson* court went on to state:

> [i]t would be anomalous to permit minors to express their views on divisive public issues and to obtain abortions without parental consent but to deny them the right to decide, within the bounds of parental judgment, whether or not to engage in [various legal] activities which at present are proscribed by the curfew ordinance.

Id. (citations omitted).

59. 711 F. Supp. at 1137.

60. The court defined the traditional family unit as a family "in which parents exercise control over their childrens' [sic] activities." *Id.*

61. *Id.* The court implied that the Washington, D.C. city council passed the juvenile curfew ordinance because they believed that the government had to act *in loco parentis* to respond to the breakdown of the traditional family structure in the city. *Id.*

regardless of their family structure.[62] The court concluded that the curfew ordinance wrongly assumed the sacred responsibilities of parenthood. Instead of improving the parents' supervisory role over their children, the ordinance actually interfered with the parents' right to control their children as they saw fit.[63] For this reason, the court held that the state must protect minors' rights the same as those of adults in the curfew ordinance context.[64]

B. *Concluding Remarks Concerning the Rights of Children in the Curfew Ordinance Context*

As the above analysis indicates, there is presently no precedential method for determining minors' rights relative to those of adults in the curfew ordinance context.[65] The Supreme Court's failure to establish a

62. *Id.* The *Waters* court failed to factually support its conclusion that most families maintain the traditional family structure. *Id.*

63. 711 F. Supp. at 1137. *See also* Note, *supra* note 30, at 1179 (arguing that "[j]uvenile curfews . . . [allow] the state to usurp parental authority over children's liberty").

64. *Id.* The court in *Johnson v. City of Opelousas* also determined that juvenile curfew ordinances inhibit, rather than promote, the parental role in child-rearing because, by imposing a curfew, the government removes parents' authority over their children with respect to the children's nighttime activity. 658 F.2d at 1073-74. The court concluded that "[t]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 1074 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

At least two other courts have found that, pursuant to the *Bellotti* concerns, nighttime curfews should not restrict children's rights to a greater extent than those of adults. *See* McCollester v. City of Keene, 586 F. Supp. 1381, 1385-86 (D.N.H. 1984); Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987).

65. While *Bellotti's* three concerns provide lower courts with the criteria to differentiate children from adults, the criteria is difficult to apply in situations factually different from *Bellotti*. The *People ex rel. J.M.* and *Waters* decisions typify the outcomes resulting from an application of the *Bellotti* analysis; they are inconsistent and irreconcilable. *See supra* notes 35-64 and accompanying text for a discussion of *People ex rel. J.M.* and *Waters*. Many courts refuse to apply the *Bellotti* framework to determine minors' rights relative to those of adults in the context of juvenile curfew ordinances. *See, e.g.*, Johnson v. City of Opelousas, 488 F. Supp. 433, 440 (W.D. La. 1980) (concluding, without assessing the *Bellotti* concerns, that the state has the power to regulate the well-being of its children), *rev'd*, 658 F.2d 1065 (5th Cir. 1981); S.W. v. State, 431 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983) (concluding, without assessing the *Bellotti* concerns, that the "[g]overnment has a legitimate right to enact laws for the protection of minors, but such laws must reasonably relate to their purpose without unduly limiting individual freedoms"); T.F. v. State, 431 So. 2d 343, 343 (Fla. 1983) (following the rationale of *S.W. v. State*); City of Wadsworth v. Owens, 42 Ohio Misc. 2d 1 (Wadsworth Mun. Ct. 1987) (determining, without assessing the *Belotti* concerns, that when an ordinance infringes

comprehensive framework for analyzing minors' rights has perpetuated the lower courts' apparent difficulty in assessing the constitutional validity of juvenile curfew ordinances.[66] The lower courts' problems in determining the validity of juvenile curfews is characterized by their inconsistent application of various levels of scrutiny to equal protection[67] and substantive due process[68] analyses of the curfew ordinances concerning minors' rights. Determining a juvenile curfew ordinance's constitutionality requires separate treatment of these issues.

III. THE CONSTITUTIONAL CLAIMS OF REGULATED MINORS IMPLICATED BY THE ENACTMENT OF JUVENILE CURFEW ORDINANCES

A. *The Equal Protection Claim*

Regulated minors have sought to invalidate juvenile curfew ordinances on the grounds of discrimination based on age,[69] wealth,[70] or educational background.[71] The decisions assessing these concerns

upon minors' fundamental rights, the ordinance's validity will be strictly scrutinized); *In re* Mosier, 59 Ohio Misc. 83 (Ohio Ct. Common Pleas 1978) (reaching the same conclusion as the *Owens* court).

66. Two Supreme Court justices acknowledged that the Court has yet to resolve "whether the due process rights of juveniles are entitled to lesser protection than those of adults," Bykofsky v. Borough of Middletown, 429 U.S. 964, 965 (1976) (Marshall, J. dissenting from a denial of *certiorari*).

67. *See infra* notes 69-85 and accompanying text for a discussion of equal protection analysis.

68. *See infra* notes 86-130 and accompanying text for a discussion of due process analysis.

69. *See, e.g.*, Johnson v. City of Opelousas, 488 F. Supp. 433, 440 (W.D. La. 1980) (holding that an ordinance classifying on the basis of age is subject to rational basis review because this classification is not suspect), *rev'd*, 658 F.2d 1065 (5th Cir. 1981); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975) (holding that age-based classifications must be scrutinized using rational basis review), *aff'd per curiam*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976) (three justices dissenting); People v. Walton, 161 P.2d 498, 501 (Cal. App. Dep't Super. Ct. 1945) (holding that rational basis review is appropriate for legislation peculiarly applicable to minors because they constitute a class founded upon a natural and intrinsic distinction from adults).

70. *See, e.g.*, Waters v. Barry, 711 F. Supp 1121, 1123 (D.D.C. 1989) (positing that a juvenile curfew ordinance has the potential to discriminate based on wealth because poor city children lack large backyards and often play in the street, an area the curfew strictly proscribed).

71. *See, e.g., In re* Mosier, 59 Ohio Misc. 83 (Ohio Ct. Common Pleas 1978) (holding that a juvenile curfew ordinance provision exempting minors who graduate from an

under an equal protection analysis are more consistent than those addressing minors' fundamental rights under a substantive due process analysis.[72] The Supreme Court has clearly established the appropriate levels of scrutiny courts should apply in assessing each of these equal protection classifications, but has not been as specific when analyzing substantive due process claims brought to invalidate juvenile curfew ordinances.[73] Current Supreme Court doctrine mandates that if a classification rests upon a real and substantial difference between the regulated and non-regulated parties, a court must apply rational basis review to the pertinent law.

The Supreme Court currently requires that an age-based classification rationally relates to a legitimate state purpose to survive judicial scrutiny.[74] Cases involving gender, alienage, or some other semi-suspect distinction require application of an intermediate level of scrutiny to the government action.[75] If the classification does not fall under

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accredited high school violates the Equal Protection Clause of the Fourteenth Amendment).

72. *See infra* notes 86-134 and accompanying text for an analysis of the cases dealing with minors' substantive due process claims based upon juvenile curfew ordinances.

73. In the juvenile curfew ordinance context, only seven decisions indicate that regulated minors brought equal protection classification claims (not including equal protection claims based upon the infringement of minors' fundamental rights).

74. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (declaring that "rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection"); Vance v. Bradley, 440 U.S. 93, 97 (1979) (holding that a provision of the Foreign Service Act mandating retirement at age 60 for Foreign Service personnel was not so unrelated to the achievement of any combination of legitimate purposes that the court could conclude that the legislature's act was irrational).

In *Murgia*, the Supreme Court held that uniformed state police officers over the age of 50 did not constitute a suspect class. 427 U.S. at 313. The Court defined a suspect class as one which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). The *Murgia* Court went on to posit that while past treatment of the aged has not been wholly free of discrimination, they have not suffered the stereotypical discrimination or the purposeful unequal treatment of those who have been discriminated against on the basis of race or national origin. *Id.* The Court concluded that old age does not define a "discrete and insular" group in need of extraordinary protection from the majoritarian political process. *Id.* Therefore, the Court applied mere rational basis review to the classification of police officers over 50. *Id.* at 314.

75. Classifications based on gender are semi-suspect because the Court has found that this category rarely bears a real and substantial relationship to the legitimate purposes of legislation. *See, e.g.*, Frontiero v. Richardson, 411 U.S 677, 686 (1973) (hold-

either of these categories, the reviewing court must deem the regulated class suspect[76] and strictly scrutinize the ordinance to determine if it offends the equal protection clause.[77]

Very few courts have considered age-based equal protection claims in the juvenile curfew ordinance context.[78] In *Johnson v. City of Opelousas*,[79] a Louisiana federal district court, determining the constitu-

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ing that classifications based on sex frequently bear no relation to the ability to perform or contribute to society). Classifications based upon alienage are semi-suspect because aliens are a "discrete and insular" minority. Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding that classifications based on alienage are inherently suspect because aliens are a discrete and insular minority). Classifications based on each of these characteristics receive some form of heightened scrutiny. *See, e.g.*, Califano v. Westcott, 443 U.S. 76, 89 (1979) (holding that a gender based distinction in the Social Security Act did not substantially relate to the attainment of any important and valid statutory goals); Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classifications based on gender must serve important governmental objectives and must substantially relate to the achievement of those objectives); Frontiero v. Richardson, 411 U.S. at 688 (holding that classifications based on gender are inherently suspect and must be subjected to strict judicial scrutiny); Graham v. Richardson, 403 U.S. at 372 (holding that classifications based on alienage are subject to strict judicial scrutiny).

76. *See supra* note 74 for the Supreme Court definition of a suspect class.

77. A leading constitutional scholar postulates that at least two principles justify the application of strict scrutiny to suspect classifications such as those based upon race or national origin: the antisubjugation principle and the antidiscrimination principle. The antisubjugation principle seeks to:

> break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens. The core value of this principle is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws. . . . The goal of the equal protection clause [under this principle] is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all. . .

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515-16 (2d ed. 1988).

> [In practice,] [t]he antisubjugation principle . . . [reserves strict judicial scrutiny] for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group.

Id. at 1520.

The antidiscrimination principle merely focuses on the present state action. If the government enacts legislation which it intends to disparately impact a minority group, the antidiscrimination principle requires that the court strictly scrutinize the law, regardless of whether that group was historically discriminated against. *Id.* at 1515.

78. *See supra* note 69 for a list of cases which consider age-based equal protection claims.

79. 488 F. Supp. 433 (W.D. La. 1980), *rev'd*, 658 F.2d 1065 (5th Cir. 1981).

tionality of a juvenile curfew ordinance,[80] failed to follow the Supreme Court's method of assessing an equal protection claim based on the age-based classification of those subject to the state action. Rather, the *Johnson* court merely recited the Court's view that age classifications are not suspect and summarily deemed the Opelousas curfew constitutional because it applied equally to all persons under the age of seventeen.[81]

Alternatively, the court in *Bykofsky v. Borough of Middletown*[82] conformed to Supreme Court mandated equal protection doctrine in assessing the constitutionality of a juvenile curfew ordinance.[83] The *Bykofsky* court explained that the age classification built into the Middletown ordinance rested on a real and substantial difference between the maturity level of adults and the maturity level of children.[84] Based on this determination, the *Bykofsky* court applied rational basis review and concluded that the curfew ordinance's age classification bore a just and reasonable relation to the government's asserted purposes for enacting the law.[85]

B. *The Substantive Due Process Claim*

Juvenile curfew ordinances are often attacked on substantive due

80. The *Johnson* court determined the constitutionality of the Opelousas juvenile curfew ordinance, which provided in pertinent part:

> It shall be unlawful for any unemancipated minor under the age of seventeen (17) years to travel, loiter, wander, stroll, or play in or upon or traverse any public streets, highways, roads, alleys, parks, places of amusements and entertainment, places and buildings, vacant lots or other unsupervised places in the City of Opelousas, Louisiana, between the hours of 11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday or Thursday night and 4 a.m. of the following day, or 1 a.m. on any Friday or Saturday night and 4 a.m. of the following day . . . unless the said minor is accompanied by his parents, tutor or other responsible adult or unless the said minor is on an emergency errand.

488 F. Supp. at 436-37 (citing OPELOUSAS, LA. CODE § 18-8.1).

81. *Id.* at 440.

82. 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd per curiam*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976)(three justices dissenting).

83. *Id.* at 1265. For the text of the Borough of Middletown statute, see *infra* note 117.

84. 401 F. Supp. at 1265. The court also noted that classifications based on age exist in various facets of society. For example, the court noted classifications with respect to the rights to marry, drink, contract, and drive. *Id.* at 1266.

85. *Id.* *See infra* note 119 and accompanying text for a list of the Borough's asserted interests.

process grounds.[86] To determine whether the Fourteenth Amendment Due Process Clause[87] proscribes a state action, a court initially determines whether the action infringes upon a minor's fundamental right.[88]

86. *See infra* notes 92-130 and accompanying text for cases in which the defendant brought substantive due process claims with respect to juvenile curfew ordinances.

87. The Fourteenth Amendment provides in pertinent part that no state shall "deprive any person of life, liberty or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

88. The Supreme Court posited that fundamental rights are those which are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Rights the Supreme Court has deemed fundamental include: (1) the right to travel; *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (stating that the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." (quoting United States v. Guest, 383 U.S. 745, 758 (1966))); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (stating that "[t]he Constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union" (quoting United States v. Guest, 383 U.S. 745, 757 (1966))); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964) (holding that the right to travel abroad is fundamental); (2) the right to freedom of movement; *see, e.g.*, Kent v. Dulles, 357 U.S. 116, 125-26 (1958) (positing that the "[f]reedom of movement is basic in our scheme of values"); (3) the right to vote; *see, e.g.*, Dunn v. Blumstein, 405 U.S at 336 (positing that "denying some citizens the right to vote, such laws deprive them of a 'fundamental political right, . . . preservative of all rights' " (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964))); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) (holding that a restriction limiting the vote to owners or lessees of property within certain school districts impinges on the right to exercise the franchise in an unimpaired manner, a right preservative of other political and civil rights); Williams v. Rhodes, 393 U.S. 22, 31 (1968) (holding that state requirements for a third political party to get on an election ballot infringed upon the right to vote, the most precious right in a free country); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966) (holding that a poll tax infringes on the right to vote, a right which is fundamental because it preserves all other rights); (4) the right to marry; *see, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (striking down a Wisconsin statute which provided that anyone with minor issue not in his custody that he is under a legal obligation to support may not marry without court approval); Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (holding that the state fees imposed incident to divorce infringed upon one's right to terminate a marriage, "a fundamental human relationship"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the prohibition of interracial marriages infringed upon the fundamental right to marry); Skinner v. Oklahoma, 316 U.S. 535, 541 (stating that "marriage . . . [is] fundamental to the very existence and survival of the race"); (5) the right to procreate; *see, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (positing that "[i]f the right to privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Skinner v. Oklahoma, 316 U.S. at 541 (1942) (positing that the sterilization of a recidivist who committed felonies involving moral turpitude infringed upon the right to procreate, a right "fundamental to the very existence and survival of the [human] race"); (6) the right to freedom of personal choice in matters of family life; *see, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (positing that "freedom of personal choice in matters of . . . family life is one of the

Traditional substantive due process analysis mandates that a state action infringing upon a fundamental right must be necessary and narrowly tailored to achieve a compelling state purpose to survive judicial scrutiny.[89] If the state action infringes upon a minor's fundamental right, however, courts often apply a lower level of scruntiny than they would in the case of an adult.[90] Because courts treat violations of mi-

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liberties protected by the Due Process Clause of the Fourteenth Amendment" (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974))); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (declaring that the right to raise one's children is "essential" and "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment").

The right to marry and the right to make personal decisions with respect to one's family also fall under the more general fundamental right to privacy. *See, e.g.*, Zablocki v. Redhail, 434 U.S. at 384 (declaring that the Court's decisions "have established that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (positing that a prohibition on the use of contraceptives infringes upon the right to marital privacy).

89. *See, e.g.*, Zablocki v. Redhail, 434 U.S. at 386-87 (implying that a regulation which directly and substantially infringes upon the fundamental right to marry must be subjected to "rigorous" scrutiny); Moore v. City of E. Cleveland, 431 U.S. at 499 (declaring that "when the government intrudes on choices concerning family living arrangements, [the] Court must *examine carefully* the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation") (emphasis added); Dunn v. Blumstein, 405 U.S. at 337 (holding that duration residency requirements granting some citizens the right to vote and denying others must promote a state interest); Kramer v. Union Free Sch. Dist., 395 U.S. at 626 (positing that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964))); Shapiro v. Thompson, 394 U.S. at 634 (holding that when a classification penalizes the fundamental right to travel, the classification is unconstitutional unless it is necessary to promote a compelling governmental interest); Williams v. Rhodes, 393 U.S. at 31 (declaring that when a state regulation interferes with one's voting or first amendment rights, only a compelling state interest in the regulation will render the regulation constitutional); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (holding Virginia poll tax unconstitutional).

90. *See supra* notes 22-65 and accompanying text for an analysis of the justifications courts give for granting state actions greater deference in the context of juvenile curfew ordinances. Notably, at the very least, the state action must survive rational basis review; that is, the state action must be rationally related to a legitimate state purpose or it will fail to survive judicial scrutiny. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 478 (1977) (positing that if a state regulation does not impinge upon a fundamental right, the Court will determine if the regulation "rationally relates" to a constitutionally permissible purpose); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17-18 (1973) (determining that a school district taxation scheme must rationally further some legitimate, articulated state purpose to be constitutional); Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring) (declaring that a statute prohibiting any individual other than an attorney from engaging in debt adjustment "bears a rational relation to a consti-

nors' fundamental rights inconsistently, the varying levels of scrutiny applied to juvenile curfew ordinances must be considered.[91]

1. Courts Applying Strict Scrutiny to Juvenile Curfew Ordinances in the Substantive Due Process Context

In *Waters v. Barry*,[92] the District Court for the District of Columbia recently employed a strict standard of review in assessing the constitutional validity of a juvenile curfew ordinance. The *Waters* court determined that the District of Columbia curfew ordinance[93] infringed upon several fundamental rights of minors.[94] For example, the court held that the ordinance infringed upon the minors' rights to walk the streets and to meet friends for any purpose, rights which the court deemed integral components of life in free society.[95] The *Waters* court declared that the First and Fifth Amendments[96] protected these fundamental liberties.[97] Therefore, the government must show that it enacted the curfew ordinance to achieve compelling purposes and that the proscription narrowly focused on the harms it sought to prevent.[98]

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tutionally permissible objective"); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (holding that a statute which prevented opticians from fitting glasses without a prescription from an ophthalmologist or optometrist bore a rational relation to the legitimate objective of freeing the eye care profession from all taints of commercialism); United States v. Carolene Prods., 304 U.S. 144, 152 (1938) (stating that "regulatory legislation affecting ordinary commercial transactions is not . . . unconstitutional unless in the light of the facts . . . it is of such a character as to preclude the assumption that it rests upon some rational basis").

91. When engaging in substantive due process analysis, courts do not always enunciate the level of scrutiny applied to the ordinance. One must often infer the standard a court applied to juvenile curfew ordinances. *See* Martin E. Mooney, Note, *Assessing the Constitutional Validity of Juvenile Curfew Statutes*, 52 NOTRE DAME LAW. 858, 872 (stating that "it is necessary in some instances to infer the standard used through reliance on the justifications provided by the court to uphold or strike down the [juvenile curfew ordinance]").

92. 711 F. Supp. 1125 (D.D.C. 1989). *See supra* notes 48-64 and accompanying text for a detailed discussion of the *Waters* opinion's analysis of children's rights relative to those of adults.

93. *See supra* note 49 for a description of the Washington, D.C. Temporary Curfew Emergency Act of 1989.

94. 711 F. Supp. at 1134.

95. *Id.*

96. The court based its decision on the Fifth Amendment Due Process Clause, as opposed to the Fourteenth Amendment Due Process Clause, because the District of Columbia, not a state, enacted and enforced the curfew ordinance. *Id.* at 1132.

97. *Id.*

98. 711 F. Supp. at 1135.

The *Waters* court found that although the ordinance did not absolutely prohibit minors' rights, the ordinance failed to withstand strict scrutiny review.[99] The court noted the importance of the government's purpose in enacting the ordinance to protect juveniles from the evils of the street and to reduce the violence occurring in Washington, D.C.[100] Further, it acknowledged that the ordinance provided several important exceptions to the restriction which reduced the burden on juveniles' rights.[101] These exceptions included exempting minors accompanied by parents, minors in automobiles, minors engaged in legitimate work, and minors required by reasonable necessity to conduct an emergency errand relating to the health of a family member.[102] The court posited, however, that the curfew's restrictions, not the curfew's exemptions, determine the ordinance's constitutional validity.[103] The *Waters* court concluded that the government did not narrowly tailor the ordinance to achieve its purpose because it stifled the liberty interests of thousands of innocent, law-abiding juveniles who resided in or visited the District of Columbia.[104] The court therefore invalidated the juvenile curfew ordinance on the ground that it violated the Fifth Amendment Due Process Clause.[105]

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99. *Id.*

100. *Id.* at 1135, 1139. The *Waters* court acknowledged that "in the eyes of many, the crippling effects of crime demand stern responses." *Id.* at 1135. The court never found the stated purpose compelling within the meaning of the strict scrutiny test enunciated in *Waters*. *Id.* at 1136, 1139.

101. *Id.* at 1135.

102. 711 F. Supp. at 1135. *See supra* note 49 for a complete listing of the exceptions provided by the District of Columbia juvenile curfew ordinance.

103. *Id.* at 1136.

104. *Id.*

105. *Id.* at 1137. Several courts have employed strict scrutiny tests to invalidate juvenile curfew ordinances on the ground that the government failed to show a compelling interest in regulating minors. *See, e.g.*, S.W. v. State, 431 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983) (holding that "[t]he relationship between the practice of barring children sixteen years of age or younger from public places unless accompanied by a parent or guardian and the objective of safeguarding minors is not compelling enough to justify the serious invasion of personal rights and liberties"); T.F. v. State, 431 So. 2d 342, 343 (Fla. Dist. Ct. App. 1983) (same as S.W. v. State, *supra*); People v. Chambers, 335 N.E.2d 612, 617-18 (Ill. App. Ct. 1975) (invalidating a juvenile curfew ordinance which infringed upon minors' fundamental rights because a "compelling emergency" did not exist prior to the curfew's imposition), *rev'd*, 360 N.E.2d 55, 57-59 (Ill. 1976) (holding that when a juvenile curfew ordinance is not aimed at the fundamental rights of minors and promotes important state interests outweighing those of the regulated minors, the ordinance is constitutionally valid); City of Wadsworth v. Owens, 42 Ohio Misc. 2d 1, 3 (Wadsworth Mun. Ct. 1987) (holding that the state failed to show a

Not all courts applying the strict scrutiny standard invalidate juvenile curfew ordinances on constitutional grounds. For example, in *City of Milwaukee v. K.F.*,[106] the court found that the Milwaukee juvenile curfew ordinance[107] infringed upon minors' rights of freedom of movement, freedom of association, freedom of speech, freedom of assembly, and freedom of religion.[108] Accordingly, the *K.F.* court applied a strict scrutiny test requiring the city to show that it narrowly tailored the curfew ordinance to achieve a compelling purpose.[109] The court found that the city drafted the ordinance as narrowly as practicable because it

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compelling interest justifying the governmental intrusion on the fundamental rights of minors resulting from the imposition of a juvenile curfew ordinance); Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987) (same as *Owens*); *In re* Mosier, 59 Ohio Misc. 83, 97-98 (C.P. Van Wert County 1978) (same as *Owens*).

Others have employed the test to invalidate curfew ordinances which were not narrowly tailored to achieve a compelling purpose. *See, e.g.*, Johnson v. City of Opelousas, 658 F.2d 1065, 1072-74 (5th Cir. 1981) (concluding that a juvenile curfew ordinance proscribing a number of innocent activities must be narrowed to achieve the government's asserted purposes of protecting youths, reducing nocturnal juvenile crime, and promoting parental control over children); McCollester v. City of Keene, 586 F. Supp. 1381, 1385 (D.N.H. 1984) (invalidating a statute which was "so broadly drawn that it impermissibly curtails . . . juveniles' personal liberty interest in free movement to pursue nondelinquent activities"); City of Seattle v. Pullman, 514 P.2d 1059, 1063 (Wash. 1973) (concluding that a juvenile curfew ordinance which failed to distinguish between conduct calculated to harm and essentially innocent conduct did not bear a real or substantial relationship to the state's asserted purpose of protecting minors); Alves v. Justice Court, 306 P.2d 601, 605 (Cal. Ct. App. 1957) (concluding that a juvenile curfew statute infringing on a number of innocent activities did not bear any real and substantial relation to the control of juveniles during the night, the statute's primary purpose); *Ex parte* McCarver, 46 S.W. 936, 937 (Tex. Crim. App. 1898) (concluding that the government could not legitimately restrain minors from engaging in innocent activity on the streets because those who committed indiscretions at night would be amenable to the law).

106. 426 N.W.2d 329 (Wis. 1988).

107. The Milwaukee juvenile curfew ordinance provides in pertinent part:

> [i]t shall be unlawful for any person under the age of seventeen (17) years to congregate, loiter, wander, stroll, stand or play in or upon the public streets, highways, roads, alleys, parks, public buildings, places of amusement and entertainment, vacant lots or any public places in the city of Milwaukee, either on foot or in or upon any conveyance being driven or parked thereon, between the hours of 11 p.m. and 5 a.m. of the following day . . . unless accompanied by [a] parent, guardian or other adult. . . .

MILWAUKEE, WIS., CODE OF ORDINANCES § 106-23 (1943), *quoted in* City of Milwaukee v. K.F., 426 N.W.2d at 332.

108. 426 N.W.2d at 337.

109. *Id.* at 339. The court failed to explicitly state that these rights were fundamental with respect to minors. Furthermore, the *K.F.* court found it unnecessary to determine whether to apply a less stringent level of scrutiny to the Milwaukee juvenile

restricted juvenile activity in public places for a short period of time each day and contained various exemptions for children accompanied by adults.[110] The court also found that the municipality's interests in protecting youths and curtailing juvenile crime were compelling within the meaning of the court's strict scrutiny standard.[111] Therefore, the court held the Milwaukee juvenile curfew ordinance constitutional within the meaning of the Fourteenth Amendment Due Process Clause.[112]

2. Courts Applying Rational Basis Review to Juvenile Curfew Ordinances in the Substantive Due Process Context

In performing substantive due process analyses, a small number of courts merely require that a governmental action directed towards mi-

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curfew ordinance because the regulation would withstand even the most rigorous examination by the tribunal. *Id.*

110. *Id.* The court also acknowledged that the city sought to pursue these interests solely by "prevent[ing] the undirected or aimless activity of minors during the curfew hours," further demonstrating the court's view that the Milwaukee juvenile curfew ordinance was narrowly tailored to achieve the city's asserted goals. *Id.*

111. *Id.*

112. 426 N.W.2d at 340. The court in *Thistlewood v. Trial Magistrate*, 204 A.2d 688 (Md. 1964) also validated a juvenile curfew ordinance applying an arguably strict standard of review. The *Thistlewood* court determined whether a juvenile curfew ordinance was reasonable by asking (1) was there an evil the government sought to prevent? (2) did the means selected to curb the evil have a real and substantial relation to the result sought? and (3) if the result of the first two inquiries was yes, did the means unduly infringe or oppress fundamental rights of those whose activities or conduct was curbed? *Id.* at 693. The court determined that the evil the ordinance sought to prevent was the formation of and resulting unlawful acts of disorderly groups. *Id.* The court then posited that the ordinance's proscription on the nighttime activities of minors bore a real and substantial relation to the objects sought to be obtained. *Id.* The *Thistlewood* court determined that the curfew did not infringe upon the fundamental rights of minors because the government was permitted to regulate and restrict the activities of minors under twenty-one years of age to a far greater extent than those of adults. *Id.* Therefore, the court held the Ocean City juvenile curfew ordinance constitutionally valid. *Id.* at 694. *See also* Mooney, *supra* note 91, at 872 (arguing that the third inquiry in *Thistlewood* "seems analogous to the compelling interest test").

Only one other court has upheld a juvenile curfew ordinance under strict scrutiny. *See In re* C., 105 Cal. Rptr. 113, 121 (Cal Ct. App. 1972) (upholding a juvenile curfew ordinance scrutinized under the *Thistlewood* test because forbidding "juveniles from loitering in the streets during nighttime hours [had] a real and substantial relationship to the dual goal of protection of children and the community, and the ordinance [in question did] not unduly restrict the rights of minors"). *But see* Mooney, *supra* note 91, at 875 (arguing that the *In re C.* court considered the *Thistlewood* test "more akin to the rational basis than the compelling interest standard").

nors rationally relate to a legitimate end to survive judicial scrutiny.[113] Courts use this lenient standard of review with respect to minors for two reasons. First, courts find that minors are altogether incapable of having fundamental rights in particular situations.[114] Pursuant to substantive due process doctrine, once a court determines that the right at stake is not fundamental, it must apply rational basis review to the state action. Second, courts find that in certain circumstances minors' activities may be regulated to a greater extent than those of adults.[115] Therefore, courts passively scrutinize some laws which infringe upon the fundamental rights of minors.

Courts seldom utilize rational basis review when determining the constitutional validity of a juvenile curfew ordinance. For example, *Bykofsky v. Borough of Middletown*[116] is the only federal court to apply this standard to a substantive due process claim on behalf of a minor regulated by a juvenile curfew.[117]

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113. *See infra* notes 114-30 and accompanying text for a discussion of rational basis review.

114. *See, e.g.*, People *ex rel.* J.M., 768 P.2d 219, 223 (Colo. 1989) (holding that a child's liberty interest in movement does not constitute a fundamental right).

115. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1257 (M.D. Pa. 1975) (recognizing that the state may restrict the activities of children to a greater degree than those of adults because children must be protected from the public and the public must be protected from the children), *aff'd per curiam*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 394 (1976) (three justices dissenting); People v. Walton, 161 P.2d 498, 501 (Cal. App. Dep't Super. Ct. 1945) (affirming that because "minors constitute a class founded upon a natural and intrinsic distinction from adults . . . legislation peculiarly applicable to them is necessary for their proper protection"). *See also supra* notes 22-34 and accompanying text.

116. 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.) (per curiam), *cert. denied*, 429 U.S. 394 (1976)(three justices dissenting).

117. The court determined the constitutional validity of the Borough of Middletown juvenile curfew ordinance, which provides in pertinent part:

Section 4. *Curfew for minors.* It shall be unlawful for any person 17 or less years of age (under 18) to be or remain in or upon the streets within the Borough of Middletown at night during the period ending at 6 A.M. and beginning

(a) at 10 P.M. for minors 11 or less years of age,

(b) 10:30 P.M. for minors 12 or 13 years of age, and

(c) at 11 P.M. for minors 14 or more years of age.

Section 5 lists a series of exceptions whereby a minor may be present on a borough street during the proscribed hours. Several of the exceptions include times when a minor is: accompanied by a parent or an adult authorized by a parent to accompany the minor; exercising first amendment rights protected by the United States Constitution; acting in a case of reasonable necessity; on the sidewalk of the place where such minor resides; returning from a school activity, or an activity of religious or other voluntary association; carrying a certified card of employment; or in a motor vehicle with parental

In *Bykofsky*, the court initially determined whether the government had legitimate purposes in enacting the curfew.[118] The government asserted four interests justifying the ordinance: (1) protecting younger children in Middletown from each other and adults on the street during nighttime hours; (2) enforcing parental control of and responsibility for their children; (3) protecting the public from minors' nocturnal mischief; and (4) reducing the incidence of juvenile criminal activity.[119] The court failed to explicitly acknowledge the legitimacy of these purposes and proceeded to analyze whether the ordinance was rationally related to the asserted purposes without discussing their validity.[120]

In assessing the relationship between the curfew and the interests of the Borough of Middletown, the court concluded that a curfew which keeps unsupervised children off the street at night must protect children.[121] It also found that the curfew encouraged parents to supervise, control and know the whereabouts of their children during nighttime hours by imposing criminal penalties on the parent of a child found on the street in violation of the curfew.[122] The *Bykofsky* court concluded that the curfew achieved the stated goals of preventing juvenile mischief and crime because the Borough's crime statistics indicated that mischievous and criminal activity among regulated juveniles decreased since the curfew's enactment.[123] Therefore, the court concluded that the Borough of Middletown curfew furthered the purposes for which it was enacted and was rationally related to the means chosen.[124]

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consent. Bykofsky v. Borough of Middletown, 401 F. Supp. at 1269-70 (quoting BOROUGH OF MIDDLETOWN, PA. ORDINANCE 662 (March 10, 1975)).

118. 401 F. Supp. at 1255.

119. *Id.*

120. *Id.*

121. *Id.*

122. 401 F. Supp. at 1255.

123. *Id.* at 1255-56. The court took judicial notice of the rapidly increasing crime rate among teenagers and that juveniles committed a large percentage of all serious crime. For example, it relied on testimony indicating that juveniles under the age of eighteen accounted for 25% of all nighttime arrests during 1970. *Id.* The *Bykofsky* court based its conclusion that the Borough curfew ordinance was effective on evidence indicating that "while there was a decrease in crime during curfew hours for both minors and adults, there was a greater relative decrease for the minors who are subject to the curfew." *Id.* at 1256.

124. *Id.* It should be noted that the *Bykofsky* court, unlike those courts applying the strict scrutiny standard, failed to determine whether the Borough of Middletown narrowly tailored the juvenile curfew ordinance to achieve their asserted purposes.

After completing its rational basis review analysis, the court went on to determine the reasonableness of the curfew as an exercise of the Borough's police power. *Id.* at 1256-

A few state courts assess the constitutionality of juvenile curfew ordinances by applying rational basis review. For example, in *People ex rel. J.M.*,[125] the court applied rational basis review to the Pueblo, Colorado juvenile curfew ordinance.[126] The government asserted the same interests as those asserted in *Bykofsky* to justify their ordinance.[127] The court determined that these purposes were legitimate within the meaning of the rational basis standard.[128] The government drafted the curfew ordinance as narrowly as possible to further their goals without unduly infringing upon minors' liberty interests; the ordinance restricted minors for only a short period of time and only in certain public places.[129] The court therefore held that the Pueblo juvenile curfew ordinance was rationally related to the state's legitimate goals asserted.[130]

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58. The court relied on their finding that the state's interests in enacting the curfew outweighed the minors' right to freedom of movement in validating the Borough of Middletown juvenile curfew ordinance. *Id.* at 1258.

125. 768 P.2d 219 (Colo. 1989). *See supra* notes 35-42 and accompanying text for an analysis of the *People ex rel. J.M.* court's treatment of minors' rights relative to those of adults.

126. 768 P.2d at 223. The court merely required the state to "establish a legitimate purpose and a rational relation between the means employed and the goals to be obtained," because the minor defendant's freedom of movement was not a fundamental right. *Id.* *See supra* note 36 for the text of the Pueblo, Colorado juvenile curfew ordinance. *Id.*

127. *Id.* *See supra* note 119 and accompanying text for government asserted state interests in *Bykofsky*.

128. 768 P.2d at 223.

129. *Id.* at 224. The court determined that the Pueblo, Colorado curfew ordinance left a minor "free to participate in any activity, whether it be social, religious, or civic, so long as he travels directly to or from that activity." *Id.*

The court also distinguished curfews which forbid the presence of minors in a public place from those which prevent minors from loitering in the streets. *Id.* The court noted that while several courts had upheld "loitering" ordinances, many others invalidated "presence" curfews. *Id.* The court concluded that the Pueblo curfew ordinance merely prevented minors from aimlessly roaming the streets. *Id.* Therefore, the *People ex rel. J.M.* court held the loitering proscription valid within the meaning of the Fourteenth Amendment. *Id.*

Arguably, the court applied an intermediate level of scrutiny to the Pueblo curfew ordinance because the court posited that the curfew was drawn as narrowly as possible to achieve the asserted government purposes. *Id.* In order to survive judicial scrutiny under the rational basis standard, an ordinance need not be so limited in scope.

130. *Id.* Other courts applying rational basis review have also upheld the constitutionality of juvenile curfew ordinances. *See, e.g., In re* Baker, 17 Dauph. 17, 23-25 (Dauphin County, Pa. 1914). Some courts applying this standard, however, have invalidated juvenile curfew ordinances. *See, e.g.*, W.J.W. v. State, 356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978) (holding that a prohibition against a child's presence in public

3. Concluding Remarks Concerning the Treatment of Minors' Substantive Due Process Claims in the Juvenile Curfew Ordinance Context

The foregoing analysis indicates the high level of confusion which exists among the lower courts in evaluating juveniles' substantive due process claims. This confusion stems from the Supreme Court's rudimentary framework for assessing minors' rights.[131] The Court's inadequate treatment of minors' rights is most apparent in the juvenile curfew ordinance context. Courts generally agree that all curfews infringe upon minors' rights. However, considerable disagreement exists concerning whether particular juveniles' rights that are violated by an ordinance should be characterized as fundamental.[132] Pursuant to traditional substantive due process analysis, the court must undertake this consideration before determining a curfew ordinance's constitutionality.[133] The Supreme Court has set forth only limited guidelines for lower courts to follow in assessing whether a minor's particular right is fundamental. As a result, some courts may deem that right fundamental while other courts may not. Based on these discrepant determinations, the courts then apply the corresponding level of scrutiny to the curfew ordinance which determines the law's validity.[134]

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places during specified nighttime hours does not have any real relationship to controlling the activities of children at night, the primary purpose of the proscription).

131. *See supra* notes 22-34, 66-67 and accompanying text for an analysis of the Supreme Court's framework for determining the rights of minors.

132. For example, several courts accept that juvenile curfew ordinances infringe upon a minor's right to movement; however, there is a split among these courts as to whether this right is fundamental. *Compare* Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (holding that a juvenile curfew ordinance restricts minors' fundamental right of movement) *and* City of Wadsworth v. Owens, 42 Ohio Misc. 2d 1, 2-3 (Wadsworth Mun. Ct. 1987) (same as *Waters*); *with* People *ex rel.* J.M., 768 P.2d 219, 223 (Colo. 1989) (holding that a juvenile curfew ordinance restricts minors' non-fundamental right of movement).

133. *See supra* note 88 for decisions which adhere to the traditional substantive due process doctrine.

134. *Compare, e.g.,* Waters v. Barry, 711 F. Supp. at 1125 (holding that the minors' fundamental right of movement requires strict scrutiny and the juvenile curfew ordinance in question was not narrowly tailored to achieve a compelling purpose) *and* City of Wadsworth v. Owens, 42 Ohio Misc. 2d at 2-3 (holding that because the minors' right of movement is fundamental, a juvenile curfew ordinance must satisfy strict scrutiny) *with* People *ex rel.* J.M., 768 P.2d at 223-24 (holding that an infringement on minors' non-fundamental right of movement requires rational basis review and the juvenile curfew ordinance was rationally related to achieving the state's asserted legitimate purposes).

The courts' inconsistent determinations as to whether a minor's particular right is fundamental produces inconsistent results on whether a curfew ordinance survives substantive due process scrutiny.

IV. PROPOSAL

The Supreme Court should establish a comprehensive analytical scheme upon which lower courts may rely in assessing whether a minor's right is fundamental in a particular circumstance. To accomplish this goal, the Court should add a new, intermediate level of scrutiny to its present substantive due process framework. Because minors have lived for a short period of time is no reason to deprive them of their fundamental rights — rights to which all others in society are entitled. The state has a special interest in the protection of its minors, however, and the Court should grant more deference to restrictions on children's fundamental rights than restrictions on adult's rights.[135] Taking into account both of these concerns, the Court should declare that a state action directed solely at minors must substantially relate to an important governmental interest unique to minors before the government may constitutionally infringe upon their fundamental rights. Under this test, minors' fundamental rights are the same as those of adults.

In applying this test to an age of majority-based classification established in a juvenile curfew ordinance, a court must initially determine whether the state has an important and unique interest in keeping children off the streets at night. For example, if a municipality asserts that its interest in enacting the curfew is to protect minors from themselves, a court must determine whether this governmental interest is important and unique to children. Although the protection of minors is important, children are not the only people who need protection from themselves and from others at night. Therefore, because the government has no unique interest in regulating the minor, the curfew fails to withstand this new form of heightened scrutiny.

If the court determines, however, that the state has a unique and important interest in keeping children off the street, it should consider whether the curfew ordinance substantially relates to this interest. For example, because the curfew always keeps children in the home, the curfew protects children from themselves and others. This protection

135. The Supreme Court has found that the state often has a special interest in children. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 638 (1968) (holding that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944))).

occurs primarily because the regulated youths will be less accessible to other children and adults than if permitted in public. Therefore, the curfew bears a substantial relation to the state interest.

V. CONCLUSION

The lower courts have had tremendous difficulty in assessing the rights of minors. This difficulty is most apparent in the courts' substantive due process analysis of juvenile curfew ordinances. In this area, the courts have displayed their confusion by inconsistently assessing whether minors' rights are fundamental. As a result of these discrepant determinations, courts have inconsistently applied different levels of scrutiny to juvenile curfew ordinances. This confusion is a direct result of the Supreme Court's failure to establish a coherent doctrine with respect to minors' fundamental rights. The Supreme Court should declare a new level of heightened scrutiny which accounts for minors' fundamental rights and their unique position in society. Adherence to this proposal will enable lower courts to uniformly and fairly assess the constitutional rights of minors.

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